No. 83-491

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ADAN LOPEZ-MENDOZA AND ELIAS SANDOVAL-SANCHEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The central thesis of our opening brief was that the court of appeals erred in extending the exclusionary rule to civil deportation proceedings in the absence of any demonstrated need for such a severe "remedy" or any convincing evidence, whether empirical or intuitive, that the rule would have its intended deterrent effect in the deportation context. The court compounded its error by failing to consider the heavy systemic costs that its decision would impose on the administrative and judicial deportation process. Respondents have failed to refute our arguments. They are unable to demonstrate the existence of any significant pattern or practice of Fourth Amendment violations by INS agents, nor are they able to show that the exclusionary rule is likely to exert a meaningful deterrent impact on the conduct of those agents. Moreover, their attempt to downplay the significance of the costs of the lower court's ruling is unpersuasive.

We address these central points below. Preliminarily, however, it is necessary to clear away some of the rhetorical excesses that permeate respondents' brief.

1. Respondents repeatedly assert that application of the exclusionary rule in deportation proceedings is essential to protect Hispanic Americans from being "inexorably * * * swept into a net of suspicion, humiliation and fear" (Br. 32; see also Br. 28-32, 90-100). They make the totally unsupported assertion that, absent the exclusionary rule, INS agents would "inevitably intensify dragnet techniques" so that the "Fourth Amendment rights of Hispanic Americans would suffer a crippling blow" (Br. 31).[1]

It is not surprising that respondents fail to offer even a shred of support for these ad hominem assertions. In reality, INS goes to great lengths to ensure that Hispanic Americans are *not* adversely affected "solely because of their race" (Br. 30). Immigration officers are instructed that they should have a reasonable suspicion of alienage before they may engage even in non-detentive questioning. INS, U.S. Dep't of Justice, *The Law of Arrest, Search, and Seizure for Immigration Officers* 3 (Jan. 1983) [hereinafter cited as *INS Handbook*]. "Reasonable suspicion of alienage" may *not* be based solely on racial factors (*ibid.*):

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[1] Even if there were the slightest foundation for respondents' assertions that failure to apply the exclusionary rule in deportation proceedings would lead to "open season" on the Fourth Amendment rights of Hispanic Americans, which there is not, respondents are hardly the proper parties to represent such interests. Respondents are *not* Hispanic Americans; they are illegal aliens. Both respondents admitted their unlawful presence in this country (J.A. 99-101; Pet. App. 101a, 112a); to the extent that respondents' brief (at 5, 11) may be read as suggesting otherwise, it is totally lacking in record support. Respondents have never before contended that their admissions of illegal alienage were incorrect; their only challenge was to the use of those admissions because of the allegedly unlawful arrests that preceded them.

> This suspicion must be based on more than ethnic physical appearance, e.g., Mexican or Chinese ancestry. This "reasonable suspicion" must be based on "specific articulable facts"—particular characteristics or circumstances which the officer can, if called upon, describe in words—such as foreign manner of dress or grooming, apparent inability to speak English, officer's knowledge of a high concentration of aliens in the area, or a specific tip from an informant.

This policy with respect to non-detentive questioning is followed notwithstanding the fact that no person is constitutionally protected against having questions addressed to him by law enforcement officers in public places. See, *e.g.*, *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5-6; *Terry* v. *Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring).[2] Thus, respondents' professed concern that Hispanic Americans will be swept indiscriminately into "intrusive and arbitrary INS workplace raids and neighborhood dragnets" (Br. 30 (footnote omitted)) is grossly overstated.

What is particularly striking is respondents' inability to point to any widespread abuses of the Fourth Amendment rights of Hispanic Americans (or illegal aliens) in the period following the BIA's decision in *Matter of Sandoval*, 17 I. & N. Dec. 70 (1979) (J.A. 163-202). While we dispute respondents' contention that *Matter of Sandoval* was a sharp break with the realities of prior immigration law (see pages 6-8, *infra*), respondents have utterly failed to show that that decision resulted in increased Fourth Amendment violations by immigration officers. Absent such a demonstration, the logical conclusion to be drawn is that the supposed "abandonment" of the exclusionary rule in deportation proceedings had no

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[2] With respect to detentive questioning, INS requires its agents to have a reasonable suspicion of *illegal* alienage (*INS Handbook* 3). And to make an arrest, the agents must of course have probable cause (*id.* at 4).

effect whatsoever on the Fourth Amendment rights of Hispanic Americans.[3]

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[3] Respondents do make the assertion that "[p]atterns of INS conduct in reported cases evidence widespread Fourth Amendment violations by immigration officers" (Br. 30 n.9). But the handful of cases respondents cite do not demonstrate "widespread" violations, and they certainly do not indicate any increase in violations in the post-*Matter of Sandoval* period. *INS* v. *Delgado*, cert. granted, No. 82-1271 (argued Jan. 11, 1984), is a rather poor choice to illustrate respondents' point, given that this Court has under submission the question whether any Fourth Amendment violation even occurred. *LaDuke* v. *Nelson*, 560 F. Supp. 158 (E.D. Wash. 1982), appeal pending, No. 83-3608 (9th Cir.), involved a challenge to INS procedures used to inspect farm labor housing units in search of illegal aliens. The district court noted that the challenged procedures were discontinued in 1979 (560 F. Supp. at 161-162) and had not been resumed at the time of decision in 1982 (*id.* at 164). The discontinuance was ordered by former Attorney General Civiletti three months *after* the BIA's decision in *Matter of Sandoval*, *supra*. Obviously, the Attorney General did not view the BIA's decision as an incentive to declare "open season" on Hispanic Americans. Moreover, the district court's decision that Fourth Amendment violations had occurred rested largely on the reasoning of the Ninth Circuit now under review by this Court in *Delgado* (see 560 F. Supp. at 162-163). *Marquez* v. *Kiley*, 436 F. Supp. 100 (S.D.N.Y. 1977), involved a challenge to "Area Control" operations, in which INS agents went to areas believed to contain large populations of illegal aliens and questioned suspected aliens as to their status. The plaintiffs sought damages and declaratory and injunctive relief. Their claim for damages was denied, the district court holding that the agents acted reasonably in detaining one plaintiff and arresting another (436 F. Supp. at 107-109). The court granted declaratory relief, but it declined to issue an injunction because "Area Control" operations had been voluntarily discontinued in 1973 (*id.* at 109, 114). Even as to the grant of declaratory relief, the court noted that the "issue is not free from doubt" (*id.* at 114) and recognized that its decision was contrary to the decisions of several courts of appeals (*id.* at 112). In *Mendoza* v. *INS*, 559 F. Supp. 842 (W.D. Tex. 1982), the court clarified its preliminary injunction to make it consistent with pre-existing agency policy, holding that INS agents need not have a reasonable suspicion of *illegal* alienage before engaging a person in non-detentive questioning and that "INS agents have the same right to enter [commercial] premises that any other person has," *i.e.*, without a warrant and without reasonable

To be sure, the fact that Hispanic Americans share the physical characteristics of vast numbers of illegal aliens undoubtedly means that, unless immigration enforcement is to be entirely abandoned, some Hispanic Americans will on occasion find themselves questioned concerning their status. But Hispanic Americans are no different in this regard from the law-abiding residents of inner-city, high-crime neighborhoods, who must inevitably experience more frequent encounters with the police than their suburban counterparts. To acknowledge that such encounters will occur, however, does not in any way suggest that they will be attended by frequent or serious violations of the Fourth Amendment.[4]

To the extent that occasional mistakes may occur—and what is most striking is their apparent infrequency for

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suspicion that illegal aliens are present. 559 F. Supp. at 851-852. Although certain aspects of the search for aliens at issue in *Mendoza* may have violated agency policy, there is no suggestion in the opinion that the incidents in that case were indicative of a widespread pattern of abuse. Finally, the district court's injunction in *Illinois Migrant Council* v. *Pilliod*, 398 F. Supp. 882 (N.D. Ill. 1975), was affirmed by an equally divided en banc court (548 F.2d 715 (7th Cir. 1977)), but only after the injunction was modified to permit non-deten[illegible]e questioning even in the absence of reasonable suspicion of illegal alienage (*ibid.*). In any event, the most serious problems found by the district court, relating to "Area Control" operations and warrantless entries into residences, have been voluntarily discontinued by INS on a nationwide basis. See page 11, *infra*.

[4] Respondents' citation (Br. 97 nn.81-82) of books and newspaper articles recounting a handful of incidents in which citizens or lawfully-present aliens were apprehended by INS not only fails to show anything approaching the widespread pattern of police misconduct that moved the Court to extend the exclusionary rule to state criminal trials in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), but does not support the conclusion that the Fourth Amendment rights of even those few persons were violated. As the Court reaffirmed in *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 16, 19-20, the concept of probable cause deals with probabilities, not certainty. Respondents have not shown that the apprehensions they cite were unsupported by probable cause.

any agency that apprehends over one million deportable aliens each year—Hispanic Americans are the persons best situated to make use of the alternative remedies, such as *Bivens* suits, actions for declaratory or injunctive relief, or complaints to the agency. See pages 15-20, *infra*. The exclusionary rule, on the other hand, obviously does nothing to protect the rights of citizens and lawfully-present aliens directly, since they will never be subjected to deportation proceedings. Hispanic Americans would benefit from the exclusionary rule only if it were shown to have the deterrent effect that respondents claim for it; but as we demonstrated in our opening brief (at 37-39) and as we discuss below (see pages 12-13, *infra*), the rule simply will not have the intended effect in the deportation context.

2. Respondents' arguments concerning the deterrent impact of the exclusionary rule in the deportation context depend entirely for their validity on the premise that, save for the period between the BIA's decision in *Matter of Sandoval*, *supra*, and the court of appeals' decision below, "INS has long operated in an investigative and prosecutorial regime in which evidence seized through an illegal search or seizure may be suppressed in deportation proceedings" (Br. 65). Respondents repeatedly refer to the "long history of *applying* the exclusionary rule to deportation proceedings" (Br. 45 (emphasis added)). See also, *e.g.*, Br. 47, 70 n.50, 99. If conditions were as respondents imagine them to have been—widespread Fourth Amendment violations by INS combined with an active exclusionary rule remedy in deportation proceedings prior to 1979—it is virtually inconceivable that reported decisions would not reflect abundant litigation and frequent applications of the suppression remedy. In fact, however, it is clear that the exclusionary rule has never been a meaningful feature of deportation proceedings.

Most telling is the fact that, prior to the decision below, the exclusionary rule was applied by federal courts

reviewing deportation proceedings in only three reported cases. *United States* v. *Wong Quong Wong*, 94 F. 832 (D. Vt. 1899); *Ex parte Jackson*, 263 F. 110 (D. Mont.), appeal dismissed, 267 F. 1022 (9th Cir. 1920); *Wong Chung Che* v. *INS*, 565 F.2d 166 (1st Cir. 1977). Quite clearly, a rule that has been applied by the judiciary only three times in 76 years cannot possibly have had any meaningful, or even noticeable, effect on agency operations.

Respondents also cite (Br. 67-69 nn.47-48) a number of BIA decisions in which the Board assumed for the sake of argument that the exclusionary rule might be applicable to deportation proceedings (but see *Matter of Sandoval*, 17 I. & N. Dec. at 75 n.7 (J.A. 170)), but declined to apply the rule, because it either found no Fourth Amendment violation or concluded that there was independent, untainted evidence of deportability sufficient to uphold the deportation order.[5] Significantly, respond-

[5] Not a single one of the cases cited by respondents in this latter category (Br. 68-69 n.48) contains a finding by the BIA of a Fourth Amendment violation. Instead, the BIA found it unnecessary in each case to determine whether there had been a Fourth Amendment violation. In *Matter of Perez-Lopez*, 14 I. & N. Dec. 79 (1972), the immigration judge had initially terminated the deportation proceeding upon finding that the evidence used to establish deportability was tainted by a Fourth Amendment violation. Thereafter, the proceeding was reopened and the alien found deportable on the basis of an anonymous tip that led INS to the same evidence in its files that previously had been suppressed. On appeal, the BIA affirmed the order of deportation and expressly noted that it was unnecessary to pass on the validity of the immigration judge's initial order terminating the proceedings (*id.* at 81).

Respondents also erroneously assert (Br. 70) that the BIA found a Fourth Amendment violation in *Matter of Sandoval, supra*. In fact, the Board found only that Emma Sandoval had established a prima facie case that would be sufficient to require the Service to justify its actions or demonstrate that any taint was too attenuated to require suppression (17 I. & N. Dec. at 73-74 (J.A. 168)). The Board's ruling on the applicability of the exclusionary rule rendered any such showing unnecessary.

ents have failed to cite a single BIA decision in which the Board actually suppressed evidence or terminated a deportation proceeding on Fourth Amendment grounds, and we are aware of no such decision.[6] It defies common sense to suppose that a rule that has never been applied by the agency, even if theoretically available, can have had any deterrent impact on the conduct of immigration officers. On the contrary, if immigration officers drew any conclusions about the matter at all, they almost certainly would have concluded that the threat of suppression was wholly chimerical. In these circumstances, it cannot seriously be urged that the exclusionary rule was having any deterrent impact on immigration officers prior to *Matter of Sandoval*, nor can it be contended that *Matter of Sandoval* provided any new incentives for immigration officers to violate the Fourth Amendment.

3. Respondents repeatedly assert that the exclusionary rule is essential to protect the Fourth Amendment rights of Hispanic Americans and lawfully-present aliens. But they have not responded to our argument (Pet. Br. 16-20) that this Court has not extended the rule to new categories of cases except upon finding a widespread pattern of flagrant violations that had not been corrected through reliance on less drastic remedies. As we have already noted (see pages 3-5 & notes 3-4, *supra*), respondents are unable to document their assertion of widespread

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[6] The BIA does occasionally terminate deportation proceedings when it finds that the circumstances surrounding a particular arrest and interrogation would render use of the evidence thereby obtained fundamentally unfair, in violation of the Fifth Amendment's Due Process Clause. See Pet. Br. 41-43. But, so far as we are aware, the Board has never suppressed evidence or terminated a deportation proceeding on Fourth Amendment grounds alone.

Respondents' contention (Br. 68-69 n.48) that the unappealed and unpublished decisions of the immigration judges likely contain "numerous" instances of suppression is inherently implausible. In light of the fact that the Service has *never* lost a Fourth Amendment suppression issue before the BIA, it seems most unlikely that it would consistently decline to appeal adverse decisions by immigration judges.

Fourth Amendment violations by INS agents; indeed, their argument is contrary to the finding of the court of appeals, which conceded that "immigration officers have not committed many Fourth Amendment transgressions * * *" (Pet. App. 28a).

As noted in our opening brief, application of the exclusionary rule is particularly inappropriate in a case like Sandoval's, in which there is nothing more than a *presumed* Fourth Amendment violation, based on the agent's inability to recall the precise details of Sandoval's detention and arrest.[7] Respondents' argument (Br. 103 & n.87) that Agent Bower lacked probable cause to arrest Sandoval is not supported by the record. It is true that Agent Bower could not recall with assurance the details of his encounter with Sandoval, but he testified that the only persons questioned were those believed to be illegal aliens (J.A. 134). Although it is somewhat unclear from Agent Bower's testimony precisely what legal standard he thought was required to question persons at the factory, it appears (J.A. 138, 140) that his general practice was to apply a standard of probable cause—clearly more than is required by either the Fourth Amendment or INS policy. Significantly, respondents do not contend that even a single one of the 37 aliens ap-

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[7] Respondents contend (Br. 101) that the government cannot be heard to complain that no Fourth Amendment violations occurred in the cases now before the Court because we did not seek review on that issue in Sandoval's case and it has yet to be determined in Lopez's case. It is of course true that, should the Court agree with the Ninth Circuit that the exclusionary rule is generally applicable to deportation proceedings, we would not be entitled to reversal on the basis of any error in that court's conclusions on the merits of the Fourth Amendment issues. But that is a far cry from saying that this Court should decide the exclusionary rule issue without considering how the rule would work in practice. For that purpose, the Court may properly examine typical deportation proceedings, including the instant cases, in order to assess our contention that there will be a relatively poor correlation between applications of the suppression remedy and actual Fourth Amendment violations.

prehended at Sandoval's place of employment turned out to be a citizen or lawfully-present alien. We doubt that the agents' apparent 100% success rate (see J.A. 129) is attributable to chance, as opposed to their careful adherence to established procedures designed to ensure only lawful arrests.

In these circumstances, respondents' reliance (Br. 1-6, 102-104) on Sandoval's testimony that he "was pulled out of line when he was in the process of entering his workplace, locked * * * in a men's restroom, and transported * * * to a police station for interrogation" (Br. 102) is wholly irrelevant.[8] If, as may reasonably be inferred from the accuracy with which illegal aliens were arrested, Agent Bower had probable cause to arrest Sandoval, there is nothing remarkable about his having been pulled out of line and placed in a holding area until he could be transported to the police station.[9]

Because of the enforcement techniques most frequently utilized by INS agents (see Pet. Br. 32), the situation that occurred in Sandoval's case will inevitably be quite common.[10] But in the absence of clear evidence that

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[8] Sandoval's testimony was never credited or relied upon by the immigration judge, the BIA, or the court of appeals.

[9] Respondents also assert (Br. 5) that Sandoval asked for his attorney while at the police station, and suggest that he did so prior to providing the information Agent Bower used to complete the I-213. Agent Bower testified to the contrary (J.A. 143):

> Q [By respondent's counsel:] Did [Sandoval] at that time indicate that he wanted to talk with me in the language some of my clients use "Abogado Charlie?"
>
> A [Agent Bower:] No, he did not. Neither he nor his wife indicated they wished to communicate with you at that time.

Agent Bower testified that it was not until he was through processing Sandoval, *i.e.*, after he had completed the I-213, that Sandoval indicated his desire to talk to an attorney to arrange bond and to take care of his wife and baby (J.A. 143).

[10] See, *e.g.*, *INS* v. *Olivas-Monorrez*, petition for cert. pending, No. 83-1535. In that case, the Border Patrol Agent who made the arrest could not recall exact details, but he testified that his cus-

Fourth Amendment violations actually are occurring in such situations, the Court must take into account the relatively low correlation that can be expected between application of the suppression remedy and actual Fourth Amendment violations.[11] This is particularly so in light of INS's voluntary abandonment of the enforcement practices that may have offered the greatest potential for Fourth Amendment violations and that appear to be most troubling to respondents' counsel. See, *e.g.*, Br. 93. For example, residential searches have been restricted to searches authorized by warrant or routine casework, *i.e.*, searches for aliens who fail to appear for scheduled hearings. See Memorandum from Benjamin R. Civiletti to David Crosland, *INS Search Policy* (January 13, 1981). (A copy of this memorandum has been lodged with the Court and served on respondents' counsel.) INS advises us that it also has abandoned "Area Control" operations (cf. *Marquez* v. *Kiley*, 436 F. Supp. 100 (S.D.N.Y. 1977)), except to the extent that such operations are carried out incident to enforcement at places of employment. In other words, random patrols of non-border areas known to be frequented by illegal aliens are no longer conducted.

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tomary procedure was not to stop anyone for questioning in the absence of articulable facts that would lead to the belief that the person stopped was probably an alien. He also testified that the arrest was part of a six-day operation in which six Border Patrol Agents had apprehended approximately 280 undocumented Mexican aliens. On the particular day that Olivas-Monorrez was arrested, the arresting agent and his colleagues already had gone to several different ranches and they "had cars and people running and going in different directions" (A.R. 32). (We have furnished respondents' counsel with a copy of our petition in *Olivas-Monorrez*.)

[11] In Lopez's case, the Fourth Amendment issue has not yet been decided. Nevertheless, we think it clear that no violation occurred. Respondents' argument (Br. 105-106 & n.90) that Lopez had a legitimate expectation of privacy in the transmission repair shop where he worked is inherently implausible. See, *e.g.*, *Babula* v. *INS*, 665 F.2d 293, 297 (3d Cir. 1981). (Contrary to respondents' argument (Br. 105 n.90), *Steagald* v. *United States*, 451 U.S. 204, 208-211 (1981), in no way forecloses us from bringing the facts of

4. Despite their repeated assertions that the exclusionary rule is "the only effective device for enforcing the Fourth Amendment in the immigration context" (Br. 18-19; see also Br. 28, 35-36, 40), respondents have wholly failed to offer any rationale to support their assumption that the rule would in fact be an effective deterrent in this context. Respondents have done no better than the court of appeals; they assert (Br. 38-43) that deportation proceedings are within immigration officers' "zone of primary interest" and that illegal evidence obtained by immigration officers for use in deportation proceedings is an "intra-agency" violation. Even if both propositions are conceded, they are merely the beginning of the analysis, not the end.

As we discussed in our opening brief (at 37-39), the assumption that the exclusionary rule will exert a meaningful deterrent impact on immigration officers is in-

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Lopez's case to the Court's attention, nor would it prevent the government from pressing its standing argument in the event of a remand.) Respondents also argue (Br. 105-106) that the agents had Lopez's name prior to entering the transmission shop and that they therefore should have obtained a warrant for his arrest. Respondents' version of the facts is based on counsel's offer of proof (J.A. 71-73) and is contrary to the agents' testimony (J.A. 15-49). Even if respondents' version were correct, however, it is irrelevant to the existence of a Fourth Amendment violation. Assuming, arguendo, that the agents had Lopez's name in advance, they could not have secured an arrest warrant based on that fact alone; probable cause to justify an arrest developed only after Lopez was questioned and voluntarily admitted his illegal alienage. At that point, the agents concluded, based on Lopez's lack of ties to this country, that he was likely to abscond before they could obtain a warrant. On the government's version of the facts, there likewise was no basis for securing a warrant in advance, since the agents testified that they had no prior knowledge of Lopez. Contrary to respondents' argument (Br. 106), however, there was no illegality because there was no "investigatory stop" (*ibid.*) that required suspicion of illegal alienage. One of the agents merely engaged Lopez in brief, non-detentive questioning, in response to which he voluntarily admitted his unlawful presence.

tuitively implausible.[12] Respondents implicitly concede as much when they assert that "[s]trong systemic incentives presently encourage INS agents to focus on the quantity of apprehensions rather than their quality under constitutional standards" (Br. 39-40). While we dispute the charge that INS agents are indifferent to constitutional standards, it seems clear that the volume of arrests made by each immigration officer renders the potential effectiveness of the suppression sanction tenuous indeed. And if further support is needed for the behavioral assumptions noted in our opening brief, it is surely provided by respondents' complete inability to demonstrate any decline in INS's adherence to Fourth Amendment requirements in the post-*Matter of Sandoval* period. See pages 3-4, *supra*.

5. If, as we have previously demonstrated, there is no reason to believe that the exclusionary rule will exert a meaningful deterrent impact on the conduct of INS agents, there is no justification for applying it, regardless of how one views the costs. But we note briefly that respondents seriously underestimate the costs actually involved.

First, respondents contend (Br. 79-83) that the cost of letting illegal aliens remain in this country is insignificant and can in any event be minimized by having INS proceed against the same aliens using untainted evidence.

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[12] Respondents argue that we have asked the Court to "plac[e] on Respondents the burden of *empirically* proving the beneficial effects of applying the [exclusionary] sanction in deportation proceedings" (Br. 44 (emphasis added)). Since we readily acknowledged the absence of any empirical data on the effectiveness of the exclusionary rule (Pet. Br. 14), it is not surprising that respondents fail to offer any citation to our brief in support of their assertion. We do not expect respondents to come forward with nonexistent empirical data in support of the rule any more than we ourselves can provide empirical data disproving its effectiveness. Respondents do, however, legitimately carry the burden of demonstrating some reasoned basis for accepting the plausibility of the deterrence hypothesis in this context, an effort they have not even attempted.

Respondents ignore the fact that in the vast majority of cases INS has no records, and hence no independent evidence, because the aliens have entered without inspection. By contrast, virtually all of the cases cited by respondents (Br. 68 n.48) involved alien crewmen who overstayed their landing permits and who thus could be linked to records already in the agency's files. When no such records exist, however, the problems confronting INS at any subsequent deportation proceeding will often be insurmountable, particularly as illegal aliens increasingly refuse, on the advise of counsel, to answer any questions at their deportation hearings.

Second, respondents downplay the significant impact on the immigration litigation system of the court of appeals' ruling. It is true that the immigration judges and the BIA have on occasion considered suppression motions in the past, but the handful of cases cited by respondents, and their complete lack of success, demonstrate that suppression issues simply have not played a major role in deportation hearings. By contrast, the Ninth Circuit's ruling inevitably will cause a substantial increase in the number of such motions filed.[13]

Respondents contend (Br. 86-87) that adequate tools are available to deal summarily with frivolous suppression motions. But if an alien need only allege facts similar to those alleged in respondents' cases in order to raise a colorable suppression issue, it is obvious that the threshold is so low that virtually every alien could meet it. The alien need rely only on the likelihood that INS would be

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[13] We noted in our opening brief (at 29-30 & n.19) that such a trend was already noticeable. Respondents are critical of our reliance on matters not in the record before the court of appeals, but we do not believe it is improper to advise the Court of the effect of the court of appeals' decision. Obviously, this material could not have been presented to the court of appeals. Moreover, we readily acknowledged that the figures noted in our brief were estimates and that complete accuracy was not possible. Nevertheless, a discernible trend is apparent, and the Court should be aware of it in its consideration of this case.

unable to refute his claim because the volume of enforcement encounters makes it difficult for agents to recall the details of each arrest. Under these circumstances, there is no reason (other than the inability of many illegal aliens to secure legal advice) not to file a suppression motion in most cases.

The substantial systemic costs that would flow from such a radical change in the deportation system are obvious. As the BIA recognized, "[t]he ensuing delays and inordinant [sic] amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counterbalanced by any apparent productive result" (*Matter of Sandoval*, 17 I. & N. Dec. at 80 (J.A. 177)). Respondents have not demonstrated any basis for rejecting the BIA's conclusion.

6. Respondents contend that existing alternatives to the exclusionary rule, such as internal discipline, *Bivens* suits, and actions for declaratory or injunctive relief, are not "adequate safeguards against the overzealous conduct of INS officers" (Br. 46-47). The pertinent question, of course, is whether the addition of the exclusionary rule would materially enhance the lawfulness of INS's activities. In our submission, it would not. Moreover, the alternative remedies rejected by the court of appeals, even if not wholly effective, almost surely are *more* effective than the exclusionary rule would be.

a. Respondents assert that "there are nearly insurmountable standing and equitable prerequisites which render injunctive relief extremely difficult to obtain" (Br. 48-49). While it is true that such actions require a proper plaintiff,[14] the obstacles are not nearly as formid-

[14] Respondents' concern that potential plaintiffs would lack standing to bring such actions appears exaggerated, at least in a case such as Sandoval's. The same question arose during oral argument in *INS* v. *Delgado*, No. 82-1271 (argued Jan. 11, 1984). Government

able as respondents contend. Indeed, it is particularly ironic that *every* example of a successful challenge to an INS enforcement practice cited by respondents (Br. 30-31 n.9) arose in the context of an action for damages or declaratory and injunctive relief. Respondents are unable to offer even a *single* example of a policy change brought about as a result of the application of the exclusionary rule. Thus, if one were to accept respondents' view that the suppression remedy was actively applied in the pre-*Matter of Sandoval* period (see page 6, *supra*), then all respondents have managed to demonstrate is that it is a far more feeble tool than civil actions for declaratory or injunctive relief. In short, it is clear from respondents' own citations that civil actions have played an important role in policing INS search and seizure activities.[15]

b. Respondents also argue (Br. 51-54) that *Bivens* actions are an ineffective remedy, primarily because they

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counsel was asked whether the factory employees in that case had standing in light of the Court's decision in *City of Los Angeles* v. *Lyons*, No. 81-1064 (Apr. 20, 1983). He responded that they did because of the likelihood that similar surveys would be conducted again at the same factories. Tr. of Oral Arg. 5, 61-62. Here, too, the record reflects that INS agents had been to Sandoval's place of employment in the past (J.A. 128), and, given the effectiveness of the surveys as an enforcement technique, there is every reason to believe that they will be repeated at factories known to employ significant numbers of illegal aliens.

Apart from standing, there may well be a question concerning the propriety of injunctive relief. Ordinarily, a law enforcement agency does not have to be enjoined in order to obtain its compliance with the law, and thus declaratory relief will usually suffice. Cf. *Marquez* v. *Kiley*, 436 F. Supp. 100, 114 (S.D.N.Y. 1977). Notably, respondents do not even address the availability of declaratory relief.

[15] Respondents complain (Br. 50) that injunctive relief "can be obtained only after the deterrence mechanism has failed." But the need to invoke the exclusionary rule in any particular case likewise means that the deterrence mechanism has failed.

rarely succeed.[16] Respondents complain that *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), shields INS agents from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." But application of the exclusionary rule to such cases would be equally inappropriate. See generally, Brief for the United States, *United States* v. *Leon*, cert. granted, No. 82-1771 (argued Jan. 17, 1984).

Moreover, as we noted in our opening brief (at 48), *Bivens* actions need not be successful to exert a deterrent effect. Respondents dismiss this suggestion as "hollow" (Br. 53), but they offer no support for their position. This Court recognized the validity of the point respondents so cavalierly dismiss in *Carlson* v. *Green*, 446 U.S. 14, 21 (1980) (footnote omitted (emphasis added)), noting that "[i]t is almost axiomatic that the *threat* of damages has a deterrent effect." INS officially recognizes the same point through its policy of intentionally erring on the conservative side of close constitutional questions (*INS Handbook* iv):

> If our policy is somewhat more restrictive than the Constitutional limit, * * * our officers are less likely to be involved in litigation over alleged violations of persons' Constitutional rights (*Bivens* suits). Also,

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[16] Respondents also complain that a potential *Bivens* plaintiff (1) must be aware that the INS agent's conduct was unlawful and (2) must then be able to find a lawyer to take his case, pay for it, and endure protracted proceedings. The first requirement hardly seems onerous; if a person is not even aware that the agent's conduct was unlawful, it seems doubtful that he has suffered any serious injury. As for the second "obstacle," the Court may take judicial notice of the fact that there is no shortage of lawyers willing to handle *Bivens* suits or to represent persons such as respondents, as evidenced by their counsel in this case. Finally, the costs of litigation and the length of the proceedings are inevitable costs associated with our entire judicial system, and they would likewise be incurred by a person invoking the exclusionary rule as a defense to the Service's attempts to deport him.

such suits are less likely to be brought, saving the Department, the agency, and the individual employee the expense, time, and anguish which such litigation entails.

Finally, respondents contend (Br. 54) that *Bivens* actions "fail to provide INS with effective incentives to adopt general policies and procedures designed to conform officers' practices to constitutional requirements." This assertion is wholly unsubstantiated, and it is contrary to this Court's observation in *Carlson* v. *Green*, 446 U.S. at 21, that "responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." Moreover, the government already "pays" for its officers' alleged misconduct by defending *Bivens* suits, and the Administration is supporting legislation to substitute the United States as the defendant in *Bivens* type actions. See, *e.g.*, S. 829, 98th Cong., 1st Sess. (1983). Again, therefore, the potential for *Bivens* actions, whether successful or not, is at least as likely to deter unlawful conduct by INS agents as is the exclusionary rule.

c. Relying primarily on a 1980 report (U.S. Comm'n on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* [hereinafter cited as *The Tarnished Golden Door*]), respondents criticize (Br. 54-61) INS's internal disciplinary program as inadequate. Most of the criticism, however, is both insubstantial [17] and obsolete. At approximately the same time that *The Tarnished Golden Door* was published, INS was voluntarily instituting a complete restructuring of its internal

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[17] Repeatedly, *The Tarnished Golden Door* adverts to various deficiencies in INS's internal disciplinary program and then observes in footnotes that INS in fact was doing precisely what the Civil Rights Commission believed should be done, but that it had not incorporated those practices into its official Operations Instructions. See, *e.g.*, *id.* at 123 & nn.52, 57, 125 & nn.73, 75. We do not view this excessive concern with form over substance as indicative of serious problems requiring correction.

disciplinary program in response to deficiencies found not by the Civil Rights Commission but by an internal Department of Justice audit. The first and perhaps most significant change was the hiring of a new director for INS's Office of Professional Responsibility. As described in one of respondents' sources that is otherwise quite critical of INS (J. Crewdson, *The Tarnished Door: The New Immigrants and the Transformation of America* 212 (1983)), the agency "recruited a tough New York City police inspector named Walter Connery to run [the OPR]. That Connery was serious about his job quickly became evident * * *." [18]

As a result, many of the deficiencies cited by respondents no longer exist. For example, complainants are routinely notified of the disposition of their complaints, a "Case Factor Solvability System" has been designed and implemented to provide clear guidance to investigators on the standards to be applied in closing or continuing investigations, and the files of closed cases are now (and have been since 1980) permanently retained.[19] In addition, more changes of the type desired by respondents are in the planning stages. For example, preaddressed, postage prepaid, Spanish/English complaint "postcards" have been prepared (a sample is being lodged with the Court and served on respondents' counsel) to

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[18] Prior to joining INS, Connery was the commanding officer in charge of internal discipline for the New York City Police Department.

[19] These changes and others are set forth in Office of Professional Responsibility, INS, U.S. Dep't of Justice, *Investigators Manual* (Jan. 1984). We are lodging a copy of the *Investigators Manual* with the Court and furnishing one to respondents' counsel. Although the manual was only recently completed, many of the procedures described therein have been in effect since 1980. To the extent that the *Investigators Manual* specifies procedures different from those contained in INS's Operations Instructions (which are undergoing revision in consultation with the unions representing INS employees), INS considers the *Investigators Manual* to control.

simplify as much as possible the process for filing complaints, and the OPR is now considering various means for increasing public awareness of the complaint process. In addition, records of complaints and investigations are being computerized so that effective monitoring will be greatly enhanced.

Respondents complain (Br. 58) that INS keeps no records on the number of complaints or disciplinary actions involving Fourth Amendment violations by INS officers. It is true that such complaints are not separately tracked, but we are advised by INS that complaints involving "pure" Fourth Amendment violations are relatively rare. Instead, such complaints are generally inextricably interwoven with complaints falling in the broad category of "civil rights" violations. These complaints are thoroughly investigated and, as we noted in our opening brief, appropriate disciplinary action is taken.[20]

For the foregoing reasons, and the reasons set forth in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1984

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[20] Respondents contend that INS's internal disciplinary program is inadequate in part because it has not stopped "even the most flagrant corruption and brutality" (Br. 55). This is somewhat like saying that the criminal laws should be abandoned because they fail to stop crime. What is important is that INS responds to these incidents with appropriate action, ranging from administrative sanctions to criminal prosecutions.

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